# 5 Multi-level governance and territorial organisation

This chapter considers a comparative assessment of constitutional provisions for the relative responsibilities of central and subnational government and how they interact, or “multi-level governance”, in selected OECD countries. It aims to identify how countries have included arrangements for multi-level governance and territorial organisation in their constitutions, and highlights that they vary greatly across constitutions. First, the chapter introduces the different categories of multi-level governance in the selected countries. Second, it presents a cross-country comparison of six foundational themes and related sub-themes through which multi-level governance arrangements and territorial organisation can be determined constitutionally. These themes are territorial organisation, structure of sub-national government, division of powers and responsibilities, finance mechanisms, impact on central state decision-making, and co-ordination mechanisms. In doing so, it provides specific examples of how benchmarked countries have included provisions regarding these themes and subthemes in their constitutions.

## Key issues

Multi-level governance structures and mechanisms vary greatly from country to country, and the past few decades have been marked by an increasing diversity in associated governance arrangements around the world in both unitary and federal countries (OECD, 2019[1]).

Decisions on territorial organisation and multi-level governance can have important implications for the quality of public services, local democracy, and fiscal sustainability of public finances, among other elements.

Multi-level governance arrangements and territorial organisation can be determined constitutionally through provisions relating to the following six themes:

- *Territorial organisation* – This is one of the core elements of most forms of multi-level governance. The constitution can recognise multi-level governance as a principle for organising a territory by detailing the number and organisation of subnational levels of government, establishing their relative autonomy, and determining whether special status is granted to selected territories on the basis of particular characteristics.
- *Structure of subnational government* **–** This is an important component of the practice of multi-level governance. The institutions of the subnational government level(s), and the degree to which subnational units have the competence to determine their own institutional set-up, can be determined through constitutional provisions. The same applies to the electoral system and protection of subnational cultural rights, such as regional languages, cultures, and traditions.
- *Division of powers and responsibilities* **–** The constitution can determine the division of competencies and tasks between the central government and the different subnational level(s) of government. Similarly, it can include provisions on subsidiarity, as well as oversight by higher levels of government on subnational governments' exercise of powers.
- *Finance mechanisms* **–** Constitutional provisions can define the financial autonomy of subnational governments – including their taxing powers – as well as arrangements for revenue redistribution through equalisation mechanisms.
- *Impact on central state decision making* **–** Constitutional arrangements can define whether subnational level(s) of government have special representation in central government institutions, for example in legislative assemblies, and the mechanisms under which they operate. Likewise, constitutions can stipulate the extent to which subnational level(s) of government need to be consulted on certain matters or with respect to certain decisions.
- *Co-ordination mechanisms* **–** A constitution can set forth solidarity principles among the different levels of government. Similarly, it can give constitutional status to vertical and horizontal co-ordination mechanisms.

Decisions relating to whether and how to include these six elements in the constitution require finding a balance between laying down fixed constitutional rules and establishing basic governing principles on the one hand, and adopting discretionary laws and procedures on the other. As this chapter demonstrates, the experience OECD member countries have had in this area is greatly varied.

## Introduction

In the 21st century, multi-level governance within countries has taken a variety of forms. Past decades have seen a trend towards greater diversity of these governance arrangements around the world, in both federal and unitary countries. Given that most responsibilities and resources are shared among levels of government, multi-level governance policies imply that managing mutual dependence is the way to achieve common objectives (OECD, 2019[1]).[1]

In this chapter, *multi-level governance* refers to any significant form of dispersal of public power across a country on a territorial basis, and thus covers a wide range of approaches, spanning both federal and unitary countries (Box 5.1). Indigenous communities with protected autonomy are also included as a form of multi-level governance, even though these are not necessarily organised by territory.

As will become clear in this discussion, many of the details regarding countries' multi-level government arrangements and territorial organisation are defined in regular or special legislation and not in the constitution itself. In fact, some constitutions explicitly require specific legislation to be adopted on these topics.

In addition, a core issue in the constitution-making process is defining the cases and circumstances in which the central government can annul decisions taken by subnational levels of government or impose on them specific policies and regulations, or in which it needs to consult with lower-level authorities.

All countries analysed use one or more forms of multi-level governance. In all of them – with the exception of New Zealand for reasons that are explained below – a dedicated segment of the formal constitution makes some provision for multi-level governance, leaving the rest to legislation and practice. The use of a constitution to provide some protection for varied forms of multi-level governance has in general become more widespread in recent times.

### Box 5.1. Federal and unitary countries

There are three broad state typologies: federal, unity and quasi-federal. A minority of countries have the federal system of government: of the 193 UN member states, 25 are governed as federal countries (40% of the world population) and 168 are governed as unitary states (Forum of Federations, 2021[2]).

#### Federal countries

In federal countries (or federations), self-governing regional entities (the federated states) have their own parliament and government and, in many cases, their own written constitution. In a federation, the self-governing status of the component states may not be altered by a unilateral decision of the federal government.

Powers and responsibilities are assigned to the federal government and the federated states by or under the provisions of a constitution. In general, federal governments have exclusive or concurrent listed responsibilities such as foreign policy, defence, immigration and currency. Many federated states also have listed competencies. Some also have residual power[2].

#### Unitary countries

A unitary state is a state in which the central government is ultimately supreme. This means that citizens are subject to the same final source of authority throughout the national territory.

This does not preclude the existence of subnational governments, also elected directly by the population and sometimes with significant political and administrative autonomy. Even so, subnational governments exercise only the powers that the central government chooses to delegate or devolve. Unitary states are thus decentralised to some extent, depending on the character and scale of subnational powers, responsibilities and resources, and the degree of autonomy they have over these different elements. In a unitary state, subnational units can in principle be created and abolished and their powers may be broadened and narrowed by the central government, subject to the constitution. Some unitary countries also recognise autonomous regions, sometimes including cities, which have more autonomy than other local governments because of geographical, historical, cultural or linguistic reasons.

#### Quasi-federal countries

Between these two main forms there is an intermediate status, albeit still emerging and amorphous: that of “quasi-federal” or regional state.. This status applies to unitary countries with federal tendencies, i.e. having some characteristics of a federal country, typically because aspects of subnational autonomy are constitutionally protected. As a generalisation, there is a growing tendency for constitutions to make some provision for multi-level governance, causing the boundaries between federal, quasi-federal and more localised forms of decentralisation to blur. Subnational regions in otherwise unitary states usually have less constitutional autonomy than those in formally federal states. Spain is an example of a state often described as “quasi-federal”.

Source: OECD (2019[1]), *Making Decentralisation Work: A Handbook for Policy-Makers*, OECD Multi-level Governance Studies, OECD Publishing, Paris, https://doi.org/10.1787/g2g9faa7-en; Forum of Federations (2021[2]), “Countries”, www.forumfed.org/countries/ (accessed on 15 April 2021).

## Brief overview of issues

This chapter groups approaches to multi-level governance into the following four categories:

- general devolution/decentralisation within any form of multi-level governance that applies across all or most of the country, whether federal, quasi-federal or regional or more localised governance
- arrangements that single out any part of the country for a measure of autonomy that is distinct from the rest and not granted to other parts
- any arrangements for multi-level governance that apply specifically to Indigenous communities
- constitutional provisions that apply specifically to particular cities, to cities generally, or to territorial groupings of cities.

Each of these categories identifies an aspect of territorial organisation that is significant in its own right. In some cases there is overlap between them. For example, Indigenous communities that are territorially organised may comprise one or more units in a general scheme of decentralisation; they may also, in some circumstances, have special autonomy. These nuances are explained in the relevant sections of the chapter.

Collectively, the 12 OECD countries covered by this chapter use all these categories of multi-level governance. In most cases, at least foundational principles are included in the constitution. In summary, the breakdown between categories and countries is as follows:

- General devolution/decentralisation exists in all benchmarking countries in some form. In three of them it takes the form of federalism: Australia, Canada and Germany. Spain is a unitary state, but has a form of deep regionalism that sometimes is described as quasi-federalism. The remainder are formally unitary countries with significant general decentralisation on a territorial basis. In all of them there is a trend toward increasing decentralisation. General decentralisation has a base in the written constitution of all countries except New Zealand, where no such constitution exists.
- Special autonomy exists in Finland (Åland Islands), Portugal (the Azores and Madeira), France (communities with special status and various overseas territories), Greece (Aghion Oros) and the Netherlands (Aruba, Curaçao, Sint Maarten). In each of these cases except the Netherlands, these arrangements are reflected in some way in the constitution. Australia and Canada also have self-governing territories that are not formally part of the federal organisation of territory but are treated as broadly equivalent and have been established by legislation.
- Indigenous communities have a form of multi-level governance in Finland, Colombia, Canada, New Zealand and (in a limited and patchy way) Australia. This type of governance is not necessarily linked to territory, although territorial organisation can be used as well (it is for example with the territory of Nunavut in Canada). In Finland, Colombia and Canada there is some reference to multi-level governance for Indigenous communities in the constitution. In both New Zealand and Canada some of these arrangements originate in treaties. In all countries there also is supporting legislation, which is likely to be regarded as highly significant (the Treaty of Waitangi Act 1975 (New Zealand) is an example).
- The constitutions of several countries provide autonomy for one or more major cities, or contemplate a specific status for them: Portugal (“large urban areas”), Colombia (Bogotá). The constitutions of Australia and Canada and the German Basic Law also recognise the seat of the federal government. Cities constitute territorial units in some forms of general devolution that is recognised by the constitution, including in Germany (Berlin, Bremen and Hamburg), where they are constituent units in federal governance arrangements. In France, Paris, Lyon and Marseille are “communities with special status” within the terms of Article 72 of the constitution. In Japan, many cities are territorial units within one of the layers of local self-government prescribed by legislation, for which the constitution provides only a very general framework.

Forms of decentralisation share some similarities across countries. They also differ, however, in conception and depth, in ways that affect the particular constitutional provisions made for them. In considering forms of decentralisation, to assist comparison, the following six themes are considered:

- Territorial organisation
- Structure of subnational government
- Division of powers and responsibilities
- Finance mechanisms
- Impact on central state decision making
- Co-ordination mechanisms

In addition, it is important to clarify the terminology linked to decentralisation/devolution (Box 5.2).

### Box 5.2. Defining multi-level governance and decentralisation: The OECD approach

#### Multi-level governance

Multi-level governance is the interaction among levels of government when designing and implementing public policies with subnational impact. This interaction is characterised by a mutual dependence, running vertically (among different levels of government), horizontally (across the same level of government), and in a networked manner with a broader range of stakeholders (citizens, private actors). Multi-level governance practices are part of every country's governance system, regardless of its institutional form (federal or unitary, centralised or decentralised), and in the vast majority of regions of the world (OECD, 2021[3]).

#### Decentralisation

Decentralisation refers to the transfer of a range of powers, responsibilities and resources from central government to subnational governments. The latter are thus governed by political bodies (deliberative assemblies and executive bodies), and have their own assets and administrative staff. They can raise own-source revenues – such as taxes, fees and user charges – and they manage their own budget. Subnational governments have a certain degree of decision-making power; in particular, they have the right to enact and enforce general and specific resolutions and ordinances.

#### Decentralisation and devolution

Devolution is a subcategory of the decentralisation concept. It is a stronger form of decentralisation, as it consists in the transfer of powers from the central government to lower-level autonomous governments, which are legally constituted as separate levels of government.

#### Decentralisation and federalisation

The next stage after devolution is federalisation, although some federal countries may actually be quite centralised systems, with few powers exercised by subnational entities.

In federal countries (or federations), sovereignty is shared between the federal government and self-governing regional entities (the federated states), which have their own parliament, government and, in some cases, constitution. In a federation, the self-governing status of the component states may not be altered by a unilateral decision of the federal government.

#### Decentralisation and deconcentration

Decentralisation and deconcentration are sometimes used interchangeably, but they are actually profoundly different. In decentralisation, there is a transfer of power from the central government to

autonomous/elected subnational governments. In deconcentration, there is a geographic displacement of power from the central government to units based in regions (territorial administration of the central government, line ministerial departments, territorial agencies, etc.).

Source: OECD (2019[1]), *Making Decentralisation Work: A Handbook for Policy-Makers*, OECD Multi-level Governance Studies, OECD Publishing, Paris, https://doi.org/10.1787/g2g9faa7-en.

## Multi-level governance and territorial organisation in the constitutions of OECD countries: Core features and key considerations

### *Territorial organisation*

A country's territorial organisation or configuration is one of the foundations of most forms of multi-level governance. To better understand how constitutions might provide for territorial organisation, this section highlights the following considerations linked to whether, in each country, the constitution:

- Recognises multi-level governance (or other terms, such as devolution, decentralisation, autonomy or self-government) as a principle for the organisation of territory.
- Prescribes the number of constituent units, and their territorial configuration.
- Provides for levels of general multi-level governance. For example, a constitution may provide for one level or multiple levels of devolved government. It may characterise the type of decentralised government at each level, in terms of depth or autonomy, and provide for evolution towards increasing decentralisation over time. In addition, it may identify whether multi-level governance also provides for special autonomy, or Indigenous communities, or specifically for cities.
- Provides for the alteration or protection of the internal territorial boundaries, including through the admission of new constituent units or the reclassification of existing territorial units.
- Provides for inter-territorial co-operation and co-ordination mechanisms.

#### *Recognition of a principle of multi-level governance*

All benchmarking countries recognise some form of decentralisation as an organising principle. Each of the four federal or quasi-federal countries does so either expressly or by necessary implication from the structure of the state. Six of the eight unitary benchmarking countries expressly recognise such a principle in the constitution. Of the remaining two, while the Netherlands has a chapter in the constitution dealing with subnational government, it does not specifically recognise decentralisation as a principle. In New Zealand, such matters are necessarily dealt with in legislation.

Each of the unitary countries expresses this principle in different ways. In some countries the principle is cast in terms of administrative decentralisation. For example, Article 1 of the constitution of France provides that the state shall be "organised on a decentralised basis". Similarly, the constitution of Greece requires the administration of the state to be "organised according to the principle of decentralisation" (art. 101(1)).

In other countries, decentralisation is explicitly coupled with autonomy in the constitution. For example, Article 1 of the constitution of Colombia provides that the country is to be "decentralised, with autonomy of its territorial units". The constitution of Japan refers to the principle of "local autonomy" (art. 92), and the constitution of Finland articulates the principle in terms of "self-government" of municipalities (Section 121). The quasi-federal constitution of Spain also makes the point in terms of principle, guaranteeing "the right to self-government of the nationalities and regions" comprising the state (Section 2).

In some countries Spain is an example – the constitution recognises both the administrative decentralisation of the state and a principle of autonomy (Sections 2, 103). In Portugal, Article 6 of the constitution provides that the state is to operate so as to respect both "the autonomous island system of self-government" and "the principles of subsidiarity, the autonomy of local authorities, and…democratic decentralisation" of state administration.

### *Provision for the number of constituent units and territorial configuration*

In the benchmarking countries, the number and territorial configuration of the constituent units is specified in a mixture of the constitution and legislation. Even in federal countries, constitutions are rarely prescriptive about territorial configuration, because of the possibility of change over time. The constitutions of Canada, Australia, Germany and (in transitional provisions) Spain nevertheless refer to the constituent units that are known at the time the constitution was drawn up. The German Basic Law anticipates change, requiring regard to "regional, historical and cultural ties, economic efficiency, and the requirement of local and regional planning" in territorial redivision (art. 29(1)).

In all eight unitary countries also, the particular territorial configuration of the constituent units in a system of general decentralisation typically is not constitutionally specified but is left to legislation. Even so, in some cases the constitution prescribes a principle to guide territorial division by law. For instance, the constitution of Greece requires the territorial configuration of the state to be based on "geo-economic, social and transportation conditions" (art. 101(2)). The constitution of Finland requires territorial divisions to be "suitable", so that the Finnish-speaking and Swedish-speaking populations of the state have the opportunity to receive services in their own language on equal terms (Section 122).

The number and configuration of territories with special status are more likely to be constitutionally specified. The constitution of France, for example, makes specific provision for each of that country's overseas territories (art. 72). The constitution of Greece identifies the territory of the self-governing region of Aghion Oros(art. 105). The constitution of Portugal identifies the territory of the autonomous islands comprising the Azores and Madeira archipelagos (arts. 6, 225). The constitution of Finland makes special provision for the self-governing Åland Islands (Section 120).

### *Provision for drawing and protecting boundaries*

In most countries, even when the initial configuration of territorial boundaries is left to legislation, the constitution prescribes procedures for altering them in the future. Such procedures ensure a degree of stability for existing boundaries and reinforce principles of local self-government.

In some cases, the constitution provides that territorial change requires the passage of further legislation and consequently the approval of a territorially representative central legislative chamber. For example, the constitution of the Netherlands requires any alteration to boundaries to be approved by a central statute and therefore the approval of the territorially representative Upper House (art. 123). In other jurisdictions, the degree of protection is stronger. Some constitutions, for example, provide for subnational consultation in addition to the passage of legislation. The constitution of Portugal requires alteration of municipal areas by legislation, following "prior consultation" with the local authorities concerned (art. 249).

In federal countries, the degree of protection for boundaries is likely to be stricter still. The constitution of Canada for instance requires not only central legislation but also approval of the legislature of the affected province (art. 43). Similarly, the constitution of Australia requires the approval of a majority of the electors in the affected state (Section 123). The German Basic Law requires a law for territorial revision to be confirmed by referendum in the affected *Länder*; it also provides a framework for *Länder* to agree on territorial alteration among themselves, again subject to referendum (art 29). Article 79.3 of the Basic Law prohibits abolishing the federal structure, the importance of which is singled out by the name of the state: the Federal Republic of Germany.

### *Prescribed levels of constituent units*

The constitutions of all countries except New Zealand make some provision for the levels and type of multi-level governance. New Zealand provides for both a level of general decentralisation and Indigenous self-governance in legislation.

In some countries, constitutions specify only a single level of general subnational government; the federations of Canada and Australia are examples. Other levels of government exist in these countries, but they are found in other sources: in Canada, local government derives from provincial statutes; in Australia it derives from the constitutions and legislation of the Australian states and territories. In an example of a different kind, the unitary country of Japan also deals only with "local self-government", although greater diversity is achieved through legislation, granting wider functions to communities with larger populations (Omnibus Decentralization Law 1999).

The constitutions of most countries, however, specify multiple levels of general subnational government. The most common configuration provides for two levels comprising regional and municipal units, although the terms for these levels differ between jurisdictions. In Spain and the Netherlands, for example, the respective constitutions provide for both "provinces" and "municipalities". The "first" and "second" administrative levels provided for by the constitution of Greece are also municipal and regional levels (art. 102(1)). Other countries specify more than two generally devolved levels. Colombia (art. 286), France (art. 72) and Portugal (art. 236) are examples. The constitutions of these three countries also provide procedures through which territories can move between levels, including through amalgamation of smaller territories into larger regions.

The constitutions of countries that have regions with special status may specify levels of government applicable in those regions, in addition to recognising the regions themselves. Portugal is an example – its constitution specifies two levels of government within its island autonomous regions: municipalities and parishes (while specifying three levels for the generally devolved mainland) (art. 236).

Some countries specifically recognise Indigenous communities as a level of government. The constitution of Colombia does so most clearly, recognising Indigenous communities as a form of territorial unit distinct from the three levels applicable to general decentralisation (art. 286, 329-330). Meanwhile**,** the constitution of Finland recognises that the Sami people have "linguistic and cultural self-government" in their region, the details of which are left to legislation (Section 121).

Finally, some countries constitutionally provide for major cities. The constitution of Portugal provides for the creation by law of specific forms of local government organisation for "large urban areas" in accordance with the applicable local conditions (art. 236(3)). The constitution of Colombia creates an elaborate special regime applicable to Bogotá, as capital of the Republic, the political and fiscal and administrative characteristics of which are determined by a combination of constitutional provisions and special laws (art. 322). In France, constitutional provision for special status communities has been applied by legislation to the cities of Paris, Lyon and Marseille. In Japan, legislation has been used to distinguish cities with larger populations from other local government, although this distinction is not reflected in the constitution itself.

## *Structure of subnational government*

The structure of subnational government is an important component of the operation of multi-level governance in practice. To better understand what constitutions might say about the structure of subnational governments, this chapter focuses on the following sub-themes to consider whether, in each state, the constitution or legislation:

- affords a degree of autonomy, or self-government, to the constituent units
- makes provision for asymmetry (i.e. different applicable rules) among the constituent units
- prescribes subnational government institutions
- prescribes an electoral system at subnational level
- offers protection to subnational cultural rights, such as regional languages, cultures, and traditions.

### *Degree of autonomy*

In almost all countries, the constitution deals to some extent with the degree of autonomy of generally decentralised levels of government. In the federated countries of Australia, Canada and Germany the degree of autonomy necessarily is prescribed by the constitution. In regionalised Spain also, the constitution makes considerable provision for regional autonomy. To this end, for example, it identifies the competencies on which regions may draw for their respective autonomy statutes and with which they can make laws with the status of full legislation, subject to review by the Constitutional Court (Sections 150, 153).

In the other unitary countries, details of the scope of subnational autonomy typically are left to legislation, subject to a constitutional guarantee. For example, the constitution of Japan recognises the principle of "local autonomy" while leaving the "organisation and operations" of the constituent units to be fixed by laws in accordance with that principle (art. 92). The constitution of France provides that territorial communities are to be "self-governing", leaving the parameters of self-governance to legislation (art. 72). The constitution of Greece requires local government agencies to have "administrative and financial independence" while leaving it to law to allocate powers and responsibilities to them (art. 72). The constitution of Finland specifies that municipal and regional administration shall provide for the "self-government" of their residents, while leaving most of the principles and duties applicable to such administration to be established by a central statute (Section 121).

Countries in which one or more units have special autonomy are likely to specify the degree of autonomy for that unit in the constitution. In Greece for instance, while the generally devolved constituent units are guaranteed "administrative independence", the autonomous region of Aghion Oros is declared to be "self-governed and sovereign" with special responsibility for spiritual matters (art. 105(1)). Similarly, the constitution of Portugal provides for the "autonomy" of the generally devolved units, but entitles the autonomous units of the Azores and Madeira archipelagos to "their own political and administrative statutes and self-government institutions" (art. 6.2). By contrast, in Finland and France, while the constitutions suggest a significant level of autonomy for particular territorial communities, the detail is left largely to specific legislation.

Countries in which provision is made for Indigenous communities also often recognise a degree of autonomy in the constitution, even if some of the detail is left for legislation or agreement between the centre and the communities. For example, the constitution of Finland provides that the Sami community have "linguistic and cultural self-government" in their native region, the content of which is left to legislation (Section 121). The constitution of Colombia provides for self-governance of Indigenous territories on specified matters, which may be supplemented by statute (art. 330). The constitution of Canada recognises Indigenous self-government by affirming the "aboriginal and treaty rights" of the Indigenous peoples of Canada, defined to include rights by way of land claim agreements (Constitution Act 1982, Section 35).

Many indigenous communities have negotiated self-government or land claim agreements with the centre; those that have not are afforded a more limited form of local autonomy under central legislation.

### *Provision for asymmetry*

A significant number of benchmarking countries made at least some provision for asymmetry: that is, the differential treatment of constituent units. Inevitably, this was more common in jurisdictions in which generally devolved constituent units co-existed with units having special autonomy (including for Indigenous communities or cities). Examples of constitutionally prescribed asymmetry include Spain (where the autonomy statutes differ among autonomous communities), Colombia (where there is differential treatment between generally devolved units, Indigenous territorial units, and the capital), France (where there is differential treatment of the generally devolved units and various categories of overseas territories), and Canada (where the province of Quebec is guaranteed a degree of special treatment under the Constitution – for example, in the composition of the Supreme Court). In some countries asymmetry may be in tension with constitutional requirements for equality. The Spanish Constitution expressly denies that such differences "imply economic or social privileges" (art. 138.2).

### *Prescribed institutions of subnational government*

In the federal countries the constituent units have considerable discretion in designing their own institutions, subject to any general restrictions in the national constitution; Australia and Germany are examples. Canada is more complicated because the federal constitution specifies the initial provincial institutions, subject to alteration by the provinces themselves. The constitution of Spain is somewhat more prescriptive as to the form of subnational government institutions, but leaves the "name, organisation and seat" of those institutions to the applicable statute of autonomy (Sections 147, 152).

In unitary countries the constitution may make some provision for core subnational institutions. The Netherlands, for example, provides for legislative councils and a form of executive government at both the provincial and municipal level. The constitution of Portugal does so too, but only at the provincial level. In some of the other countries, the constitution provides only for a single subnational governing body at the first level of generally devolved units. The constitution of Greece, for example, provides only for elected local government agencies, the constitution of France for elected councils, and the constitution of Japan for deliberative local public assemblies. In still other countries, constitutional provision for subnational institutions of government is non-specific and legislation is needed to shape them. For example, the constitution of Finland requires subnational self-governing administrations, but leaves it to legislation to determine the form of the institutions themselves (Section 121).

Countries that have special status autonomous regions commonly specify or recognise the government institutions for those regions through the constitution. The constitution of Portugal, for example, prescribes legislative and executive branches of government for its autonomous regions (art. 231). The constitution of Greece recognises a distinctive monastic system of government for the Aghion Oros region (art. 105).

Countries that provide a degree of autonomy for Indigenous communities as constituent units also commonly specify their governance institutions. Usually this is done by legislation, as in Finland, New Zealand and Canada. For example, in Finland, legislation establishes the Sami Parliament as a representative body responsible for Indigenous cultural autonomy (Act on the Sami Parliament, Section 1(1)). The exception is Colombia, where the constitution itself provides for traditional council government in Indigenous territories (art. 329).

Countries that make provision for cities as constituent units also may specify governance institutions. The constitution of Colombia, for example, provides for council governance in respect of Bogotá (art. 322). The constitution of Spain recognises council governance for Ceuta and Melilla.

*Prescribed electoral system*

The constitutions of the unitary countries covered by this chapter commonly make some provision for election to the subnational institutions of government. One approach is for a constitutional provision to set down broad principles with which an electoral system to be defined by law must comply. For example, the constitution of the Netherlands transposes the central suffrage requirements to the subnational level and prescribes a subnational electoral system of "proportional representation" within boundaries laid down by a central law (art. 129). In a number of other countries, the constitutional requirements are more precise. The constitution of Portugal for example prescribes a hybrid electoral system for regional units: a combination of direct election and electoral college components, using a specified method of calculation (arts 231, 239, 260). In other countries, the constitutional requirements are less prescriptive: usually they impose a general requirement for a popular election of some kind, leaving the rest to legislation. Greece, Finland, Colombia and Japan are in this category.

As in other matters, the position in federal countries is somewhat different. Subnational electoral systems are more likely to be left to the constitutions or laws of the subnational units, subject to an overriding requirement or assumption of democratic choice. Treatment of electoral systems for regions with special autonomy varies, but Portugal offers an interesting medium position: the assemblies of the autonomous regions can draw up their own electoral laws, but they must finally be passed by the Assembly of the Republic itself (art. 226).

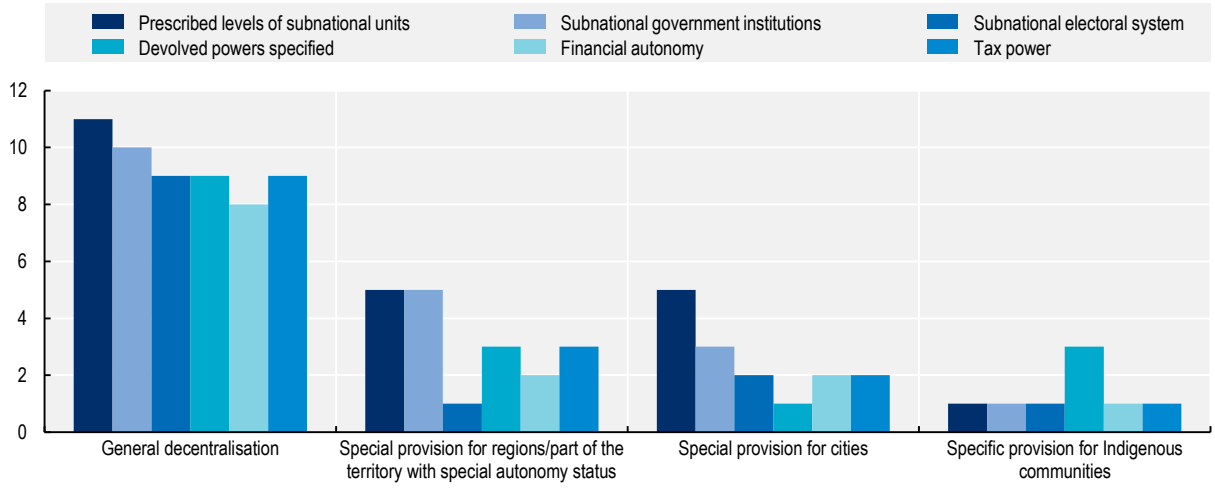
*Protection of cultural rights*

Cultural rights for communities recognised through multi-level governance also contribute to the nature and depth of self-government. For present purposes, cultural rights encompass regional or Indigenous languages and regional traditions, insignia and cultural practices (see Chapter 3 for more comprehensive discussion on economic, social and new rights). Regional and Indigenous languages are protected in the constitutions of France, Finland, Canada, Colombia and Spain in ways that include recognition as heritage, recognition as local official languages, and the right to use regional languages in dealing with public authorities. Cultural rights more broadly are recognised in the constitutions of Finland, Greece, Portugal, Colombia and Spain. In some countries, protections for rights of this kind are also provided in legislation. For example, the constitution of Finland recognises Sami linguistic and cultural self-government as determined by legislation (Section 121). This legislation in turn recognises the Sami "linguistic and cultural autonomy in the Sami homeland" (Act on the Sami Parliament, Section 1(1)).

## *Division of powers and responsibilities*

This section focuses on how benchmarking countries divide legislative and other powers and responsibilities between the central and subnational levels. In doing so, it distinguishes among the four categories of decentralisation set out at the beginning of the chapter. Figure 5.1 below provides an overview of the number of countries with constitutional provisions in these themes, by subnational group.

## Figure 5.1. Number of countries with constitutional provisions in various themes of multi-level governance and territorial organisation, by subnational group




Note: 12 countries are reviewed (n=12).
Source: Author's elaboration.

### *General decentralisation/devolution*

Seven of the benchmarking countries make specific provision for the powers and responsibilities of subnational levels of government in the constitution itself (Portugal, Colombia, Spain, Japan, Australia, Germany and Canada).

Among these countries, there is a high degree of variation in the level of prescription in the constitution and in the nature and scope of what is prescribed. It is useful here to distinguish between federal countries on the one hand and unitary countries on the other. Spain has a particular system, which is unitary but with a strong degree of decentralisation through its autonomous communities system.

In all three federations the constitutions divide legislative power, in the sense that both levels of government have identifiable competencies and both may make laws within their areas of competency in a form that is accepted as legislative in character. In these countries, the division of power is constitutionally protected and cannot, as a general rule, be changed by legislation. In regionalised Spain also, the autonomous communities can exercise full legislative power in the areas of their own competency. These areas are secured by their respective statutes of autonomy. However, the constitution itself lists only the exclusive competencies of the central state (Section 149).

It should be noted in passing that federations often have multiple levels of government and the powers and responsibilities of lower-level constituent units are not necessarily enumerated in the national constitution or in national legislation. Germany is an example of one approach: while the Basic Law comprehensively sets out the division of legislative powers between the federal government and the *Länder* (states) and offers some protection for the municipal level of government, the powers of municipalities are left largely to the *Länder*.

In contrast, the other unitary countries are less constitutionally prescriptive as to the division of power. In other words, constitutions in these countries often recognise subnational autonomy in relatively general terms, but leave details of the scope of subnational powers to legislation. Typically also, laws made by subnational units within their allocated powers are described in terms of "regulation" (or another similar term) rather than "legislation", a distinction that has greater practical significance in countries with a specialist constitutional court that controls only the validity of legislation.

Some examples illustrate the point. The constitution of Japan affords local public entities the power to enact "their own regulations, within law" (art. 94). The constitution of France provides that "territorial communities may take decisions in all matters arising under powers that can be best exercised at their level" and "have power to make regulations for matters coming within their jurisdiction", leaving the precise boundaries of that jurisdiction to law (art. 72). The position is broadly similar in Portugal (art. 241) and Greece (art. 102(1)).

### *Autonomous regions*

The powers and responsibilities of special autonomous units in unitary countries typically are more extensive than those at the levels of government under the scheme of general devolution. Typically also, this is recognised in the constitution even if to a varying extent such powers usually are further governed by central laws. The constitution of Finland, for example, recognises the special autonomy of the Åland Islands but also enumerates the legislative powers of this autonomous region in special legislation it refers to (Section 75; see Autonomy of Åland Act 1991, rticle 5). The constitution of France confers on overseas territories the power to make rules adapting central law (otherwise automatically applicable) on a limited number of matters where empowered by law, but within strict bounds and to the exclusion of matters of central concern that are enumerated (e.g. nationality, criminal justice, foreign policy, and defence). These excluded matters may be clarified or amplified by a central statute (art. 73). The constitution of Greece constitutionally devolves local spiritual supervision to the entities of the Aghion Oros regions, leaving other matters to central law (Art. 105). The position is somewhat different in Portugal, where the constitution identifies the legislative powers of the autonomous regions in greater detail, although in terms that still leave considerable work for legislation (Arts 227, 228).

### *Indigenous communities*

The powers and responsibilities of Indigenous communities are prescribed in the constitution, organic law and/or legislation in five of the benchmarking countries: Canada, New Zealand, Finland, Colombia and, through recognition of land rights, in Australia, where Indigenous self-governance is still evolving. In each case the scope of powers and responsibilities are shaped to a significant degree by the historical treatment and legal recognition of Indigenous peoples by the state.

In terms of constitutional protection, the constitution of Colombia defines Indigenous communities as a "special jurisdiction", whose authorities may exercise "jurisdictional function" within their territory in accordance with their own law so long as it is not inconsistent with the constitution and central laws (art. 246). In Finland the constitution recognises the right of the Indigenous people (the Sami) to develop and maintain their own language and culture (Section 17). In Canada, "aboriginal and treaty rights" are recognised and affirmed" (Section 35). In New Zealand, the fundaments of the relationship between the Māori and the state are governed by the Treaty of Waitangi Act 1975. This document establishes core principles to govern the relationship, often referred to as the principles of partnership, participation, and protection. Ordinary legislation both references and incorporates the treaty and gives particular roles, powers and responsibilities to the Māori (for example, Local Government Act 2002, Section 4; Resource Management Act 1991, Section 8; Climate Change Response Act 2002, Section 3A.).

### *Cities*

Generally, the constitutions of the benchmarking countries do not treat cities differently for the purposes of allocating roles and responsibilities to them. On the other hand, cities sometimes may be territorial entities for the purposes of the general system of devolution and so have powers allocated to them on that basis. Colombia is an exception; the constitution of Colombia makes special provision for Bogotá as the national capital. It elevates the city to a district and gives it distinct if general responsibilities to "guarantee the

harmonious and integrated development of the city and the efficient provision of services for which the district is responsible" (Art. 322).

### *Finance mechanisms*

This section deals with the extent to which the financial arrangements for subnational government are reflected in constitutions rather than in legislation. In particular, it addresses the following elements:

- financial autonomy, including taxing power
- arrangements for revenue redistribution
- fiscal equalisation.

It is important to note that the meaning and effect of all constitutional provisions depend on factors beyond the constitutional text and legislation. This is particularly so in relation to fiscal arrangements for subnational government, which may also depend on less formal arrangements and governmental practice.

#### *Financial autonomy, including taxing powers*

In the category of *general decentralisation,* most of the countries covered by this chapter recognise some level of financial autonomy for subnational units in the constitution, with further details elaborated in legislation. Each country does so, however, in different terms and to different degrees.

The constitutions of most countries set forth a principle of fiscal autonomy for subnational units; sometimes also, they acknowledge the importance of a power to tax, or to share the proceeds of taxation, in order to realise that principle. At one end of the spectrum of practice, however, some constitutions do not prescribe a particular degree of financial autonomy and leave the details of the taxation arrangements to be determined by legislation. The constitution of the Netherlands is in this category; it provides that "the taxes which may be levied by the administrative organs of provinces and municipalities and their financial relationships with the central government shall be regulated by Act of Parliament" (art. 132). Greece is another example, where the constitution requires the central state to adopt measures necessary for ensuring the "financial independence" of local government (art. 102.5). To illustrate a different approach, the constitution of France authorises territorial communities to receive the proceeds of taxation imposed by the central state and to vary the bases of assessment and rates if authorised to do so by law (art. 722). Further along the spectrum of other constitutions, the German Basic Law provides detailed arrangements for tax sharing with the *Länder*, with provision for modification by legislation, within limits. Even in relation to municipalities, otherwise a *Länd* competency, the Basic Law recognises that "the guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right…to a source of tax revenues" (art. 28).

The constitutions of most of the countries confer on subnational governments an express power to impose taxation generally, or particular taxes on one or more levels of subnational units (Finland, Portugal, Colombia, France, the Netherlands, Australia, Germany, Spain and Canada). In federal countries, this conferral is an aspect of the federal division of powers. In unitary countries, it is more likely to be in terms of principle, leaving the detail to be determined by legislation (for example in the constitution of Finland, Section 121). Less often, some countries studied confer an exclusive power on a designated level of government to impose particular taxes. For example, the constitution of Colombia provides that "only municipalities may tax real estate".[3]

Tax powers for units with *special autonomy* may receive more explicit constitutional protection and be more extensive. The constitution of Portugal provides the Azores and Madeira regions with a tax power subject to central law (art. 227(j)). On the other hand, such arrangements may be tied to institutional law passed within the framework of the constitution, as in Finland and France.

The constitution of Colombia provides that *Indigenous communities* can be territorial entities with the right to administer their resources. It establishes the taxes necessary for the exercise of their functions, subject to the constitution and relevant central law (arts 286, 287).

Only one of the countries covered by this chapter has a constitution that specifically assigns a tax power to cities, and that is in the unusual case of the Spanish cities of Ceuta and Melilla on the Moroccan coast. These enclaves are established as self-governing cities, with tax powers subject to the constitution and central law, as in the case of local entities and autonomous communities generally (Sections 133(2), 142, 157(1)(b)). In Colombia, by contrast, the special regime for Bogotá leaves fiscal arrangements to special or general laws (art. 322). Where cities also form part of the general scheme of decentralisation, as in Germany or France, they enjoy whatever fiscal autonomy and taxation authority is conferred on other units.

#### *Provision for revenue redistribution and fiscal equalisation*

Many countries, including all of the federal countries, make provision in the constitution for revenue redistribution, in the sense of moving revenue from one level of government (usually, the central level) to another. Transfers of this kind may contribute to fiscal autonomy, may compensate for the transfer of substantive functions, or may be a vehicle for achieving fiscal equalisation.

Again, there is wide variation. Some countries, such as Germany, provide a relatively detailed fiscal constitution (Basic Law). Other countries include normative principles or objectives for financial arrangements in the constitution, leaving details to be prescribed in legislation, sometimes through co-operative arrangements among levels of government. Portugal is an example: in relation to the general scheme of devolution, its constitution provides for promotion of “the just division of the national product between…regions” (art. 90). More specifically still, in relation to the autonomous regions of Portugal, the constitution requires the “sovereign power” to ensure the “economic and social development” of the regions with a particular view to the correction of inequalities deriving from their “insular nature” (art. 229). In an example of another kind, the constitution of Spain guarantees implementation of the principle of solidarity by seeking a “fair and adequate economic balance” among different Spanish territories (art. 138).

The constitutions of at least eight of the benchmarking countries provide a guarantee of some kind that when the responsibilities of some subnational units are increased (through delegation in particular) from the centre, the financial allocation to the unit will be increased as well. For example, the constitution of France provides that when powers are transferred between the central government and territorial communities, revenue equivalent to that given over shall also be transferred (also see the constitution of Greece, art. 102(5)). The actual mechanisms for that transfer are contained in legislation.

Some countries also make specific provision for the principle of fiscal equalisation and its realisation, in the constitution or in legislation. Fiscal equalisation in this context refers to the allocation of public funds to ensure that the fiscal capabilities of subnational units are roughly equal, or at least meet an acceptable minimum standard. In Canada and Germany such arrangements have constitutional protection; in Australia, they derive from legislation and practice. In other countries, a form of equalisation may be assumed from provisions dealing with, for example, solidarity.

### *Impact on central state decision making*

This section focuses on the effect of multi-level governance on the decision-making structures and procedures of the central state. It highlights the following elements*:*

- an obligation for the centre to consult with the subnational units or to co-operate with them on certain matters or in respect of certain decisions
- a central institution of government that represents the subnational units, for instance a territorially representative second chamber in the central legislature

- central supervision or monitoring of subnational governance or decision making.

### *Obligation to consult*

Among the benchmarking countries, it is relatively common for the constitution to oblige (or at least encourage) the centre to consult with subnational units in respect of certain matters of subnational concern.

One such matter concerns changes in territorial configuration, or the status or numbers of subnational units. For example, the constitution of France provides for the consultation of voters in respect of the creation or modification of a special status region, or the status of an overseas territorial community. Similarly, the constitution of Portugal mandates that municipal governance institutions be consulted before the creation, abolition or alteration of municipalities (art. 24).

Constitutions may also mandate or encourage consultation in central decision making that concerns overlap with subnational responsibilities. An example is Portugal, where the constitution mandates that bodies exercising sovereign power co-operate with the self-governing institutions in relation to "such issues as fall within their own responsibilities and concern the autonomous regions" (art. 229(2)). The German Basic Law requires that the central government consult subnational unit governments before concluding any treaty affecting the "special circumstances" of that unit.

The usefulness of subnational perspectives for central decision making means that constitutional provision for consultation sometimes is made in relation to other matters as well. National planning is an example. For example, the constitution of Colombia provides for a consultative body: the National Planning Council, made up of representatives of the subnational units, provides a forum for discussion on national development planning (art. 340). The constitution of Spain includes a provision requiring the central government to base planning projects on forecasts provided by self-governing units (Section 131(2)). General provisions of this kind may have varying degrees of effectiveness in practice, but they nevertheless can provide valuable guidance on the principles that inform the constitution.

### *Territorially representative central institutions*

Among the benchmarking countries, two of the three federations have a central institution with constitutional status that represent the territorial units as currently configured. In Germany, the Bundesrat or Federal Council comprises representatives of the *Länd* governments and plays a role in the legislative process; it has a veto in matters affecting the *Länder* in particular ways and other specific powers where the interests of the *Länder* are concerned. Australia has a senate that represents the constituent units equally, with veto power over all legislation. Paradoxically, from the standpoint of multi-level governance, the Bundesrat is more representative of the regions. In some cases, second chambers representing other levels of government have additional scrutiny powers and influence over appointment to other central institutions. By way of example, the Bundesrat plays a role in appointing members of the Federal Constitutional Court. Canada also has a senate, but its members are appointed by the central executive on a regional basis (art. 21-3).

A territorially representative central institution of governance is less common in the unitary jurisdictions. Nevertheless, France and the Netherlands have institutions of this kind. France has a senate – a territorially representative body – which is constitutionally assigned special responsibilities, some of which directly affect subnational matters. For example, bills in respect of the organisation of territorial communities must be first discussed in the senate (art. 39); the senate also appoints three members of the *Conseil Constitutionnel* (Constitutional Council) and performs other national roles. The Netherlands has an Upper House, whose members are elected by members of the subnational governments (art. 55). In a variation, while the Colombian senate is not representative of different levels of government, the constitution provides for two senators from Indigenous communities, elected from a nationwide constituency; indigenous communities also have a special constituency in the House of Representatives (arts 171, 176). In

unicameral Finland, the constitution provides that the Åland Islands have their own constituency for election to the parliament (art 25).

#### *Central supervision or monitoring*

Among the benchmarking countries, many make provision of some kind for central supervision or monitoring of subnational governance or decision making. There is something of a trade-off here, between local autonomy subject to judicial control to ensure compliance with law, and administrative supervision from the centre that can diminish that autonomy. For these reasons, central intervention is often available only on limited grounds and in accordance with specified procedures that may require consultation with the units concerned or consent from a territorially representative chamber of the central legislature. The constitution of Greece, for example, guarantees subnational governance "initiative and freedom of action" while providing for central supervision to an extent permitted by law, and limited to reviewing the legality of subnational action (art. 102). The constitution of the Netherlands requires supervision of subnational bodies to be regulated by law and restricts the grounds on which decisions can be quashed by "law or the public interest" (art. 132). The constitution of Spain also provides for central scrutiny in the exceptional case where it appears that a self-governing community has not complied with constitutional or other legislative obligations, or has prejudiced the national interest (Section 155). But the interests of the subnational units receive some protection from this procedure: the central government must first raise the issue with the government of the subnational unit, and any scrutiny requires majority approval of the territorially representative senate.

The scope of supervision is often linked to powers shared with or delegated by the state. For example, the German Basic Law gives the federal government more control over *Länd* execution of federal laws on federal commission than over *Länd* execution of federal laws in their own right (art. 85). The constitution of Portugal provides for limited central legislative scrutiny, in respect of constitutionally shared powers (art. 162). It establishes a somewhat different regime for its self-governing autonomous regions, in each of which there is a representative of the republic with responsibility for monitoring regional legislative decrees (arts 230, 233).

### *Co-ordination and co-operation mechanisms*

This section deals with other co-ordination mechanisms connected with multi-level governance in the benchmarking countries. In some countries they overlap with institutions through which lower levels of government are represented in central institutions, which were considered in the previous section. The *key issues* here include:

- recognition of the principles of solidarity/loyalty or co-operation between governments at all levels
- mechanisms for horizontal co-ordination
- mechanisms for vertical co-ordination.

#### *Principles of solidarity or loyalty*

The constitutions of countries with multi-level governance in the civil law tradition often include reference to principles of solidarity or loyalty, expressly or by implication. Germany, Spain, Colombia and Portugal are examples. The meaning attributed to them varies, but they may have implications for fiscal equalisation, for example. Other countries, of which Canada and Australia are examples, typically do not recognise such principles, but may give effect to them in practical ways (again, including fiscal equalisation).

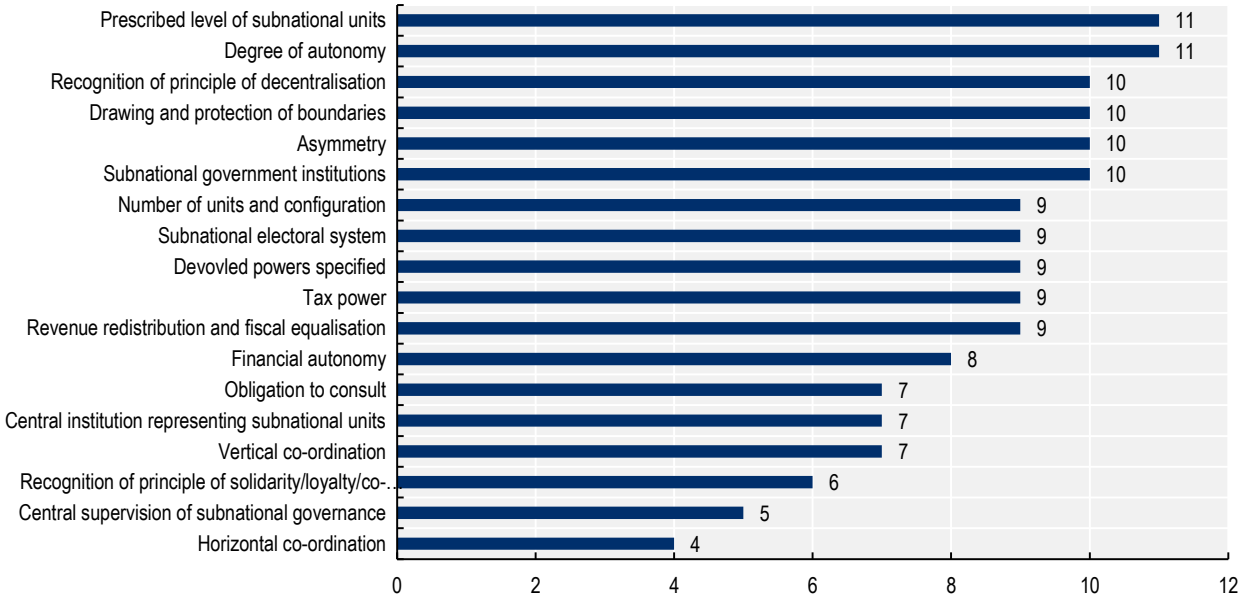
### *Horizontal co-ordination*

Many countries have arrangements for co-ordination among units on the same level, including to resolve cross-border problems. Typically these are not included in the constitution but may be found in legislation or created ad hoc as the need arises. Spain is an exception, where Section 145 of the constitution anticipates the need for self-governing communities to co-operate in managing and delivering services, if authorised to do so by their statutes or autonomy, or if the agreements are approved by the parliament. Horizontal co-ordination also may sometimes be needed between territorial units and their equivalents in neighbouring countries: art. 289 of the constitution of Colombia makes provision for such co-ordination, if authorised by central legislation.

### *Vertical co-ordination*

Countries typically have a range of institutional mechanisms for vertical co-ordination between the centre and other levels of government. Similar mechanisms may exist between constituent units and local government. These may take a variety of forms, some of which have constitutional status. The representation of constituent units in central institutions may, depending on design, contribute to vertical co-ordination: the institution of the Bundesrat in Germany is an example. The constitution of Portugal offers a good example of express provision for vertical co-operation, with requirements for central institutions to work in co-operation with self-government bodies; to consult them on matters that affect them; and to develop other forms of co-operation, including in relation to the delegation of responsibilities (art 229). A number of other constitutions identify other forms of co-operation: Article 73 of the French Constitution, for example, envisages central legislation allowing overseas territories to adapt central legislation to local conditions, at the request of the territorial community and subject to the applicable institutional act.

## Figure 5.2. Number of countries with constitutional provisions in different themes of multi-level governance and territorial organisation (12 OECD countries)




Note: 12 countries are reviewed (n=12).
Source: Author's elaboration.

## Key options and questions to consider

The core issues presented in this chapter are the need to identify the desired form(s) of multi-level governance and to decide on the extent to which the constitution should provide a framework for them rather than providing for them in special or general legislation.

### *Territorial organisation*

- One core consideration related to the territorial organisation of the country is whether to opt for establishing a general system of multi-level governance. If the country does, governance can take the shape of a federation, as in the case of Mexico or the United States, for example; or that of a unitary state, such as in France or the Netherlands. A possible third option would be a "quasi-federal" or "regional state", which as indicated earlier applies to unitary countries having some characteristics of a federation. If selecting that third option, it is important to establish the degree of autonomy that the subnational level(s) of government will have. Examples range from relatively deep regional autonomy, as is the case of Spain, to lesser levels of autonomy, as in the case of Finland or Greece. In addition, it can be decided to have either one or multiple levels of devolved government.
- Another important issue to resolve regarding the country's territorial organisation has to do with the degree of symmetry in the autonomy provided to the subnational units. It can be decided to establish an asymmetrical territorial organisation wherein an additional degree of autonomy is granted to one or more selected territories due to their geographical location, the cultural identify of their population, or some other characteristic. For example, in case Indigenous communities are territorially concentrated, these could either be considered standard units in the general system of multi-level governance, or alternatively be granted a form of special autonomy. In case the Indigenous communities are not territorially concentrated, they might be recognised as a non-territorial constituency for the purposes of multi-level governance. Similarly, special recognition could be granted to one or more cities due to their political or economic relevance. They can also be defined as normal units in the general system of multi-level governance.
- In all of these cases, it is important to determine whether to specify the general territorial configuration and its particular arrangements – regarding, for example, the number of subnational government levels (regional/intermediary levels, municipal levels), or the status of Indigenous communities or certain cities – in the constitution, or rather in general or special legislation. In the case of the former, other relevant issues to consider are the level of detail provided in the constitution about the territorial organisation; the extent to which subsequent changes to the territorial configuration should be subject to special procedures that are protected by the constitution; what such procedures would entail; and whether consent from the affected units should be required.

### *Structure of subnational institutions*

- Besides territorial organisation, consideration should be given to what institutions at the subnational level(s), such as legislative assemblies or forms of executive government, should be constitutionally specified or recognised, and what the constitution should say about these. Consideration can also be given to the question of whether subnational units should be able to propose their own legislative or executive institutions or rather consent to those proposed by the central government, and if such provisions need to be included in the constitution or rather in specific legislation. A particularly relevant question to reflect upon is whether or not to include articles pertaining to the electoral system of the subnational level(s) of government in the

constitution – as is the case with Colombia and Finland – or rather in general or special legislation – as is the case with Canada and France.

### *Division of powers and responsibilities*

- The division of powers/competencies and functions among the different levels of government, and whether to embed these in the constitution or in specific legislation, are other crucial elements to take into consideration; such decisions have implications for a wide range of issues, such as service delivery and (democratic) oversight. It is important to make the distinction between competencies and functions. For each area of competency, different key functions can be distinguished: regulating, operating, financing and reporting.
- Questions arise in this regard. What powers/competencies and functions should (each of) the level(s) of subnational government have? What powers and functions are shared among one or more levels of subnational government and with the central government? What should the constitution stipulate on these matters? For example, it could include a general statement regarding the principles of subsidiarity or grassroots democracy, and leave specification of particular powers/competencies to general or special legislation. Alternatively, the constitution could confer general power on the subnational level(s) of government, subject to the reservation of specified exclusive powers by the centre.
- In most countries, rather than a clear-cut separation of responsibilities, the majority of them are shared across levels of government; the trend toward shared responsibilities has increased over the past decades. This may be explained by functional factors. For example, it is common for municipal and regional tiers of government to share responsibilities around issues of transport, infrastructure and water. Yet the trend may also be due to financing reasons (OECD, 2019[1]). This mutual dependency requires a clear assignment of functions, mutual understanding of who does what, and well-developed co-ordination mechanisms (OECD, 2019[1]). Furthermore, considerations about the assignment of powers/competencies should be closely linked to the conversation about the number of subnational levels of government. In two-tier subnational government systems across the OECD area, the regional level usually provides services of regional interest. In systems with more tiers, the breakdown of competencies can be more complex, sometimes resulting in co-ordination challenges (OECD, 2019[1]).
- Other issues to resolve in this regard have to do with the exercise by the subnational level(s) of government of their powers and functions on the one hand, and the checks and balances on their actions on the other. For example, subnational units could be allowed to exercise their competencies through legislation or rather a lower form of legislative power such as “regulation”. The decision in this matter is also related to the question of whether the lawfulness of the exercise of subnational competencies should be controlled by a constitutional court or by another type of court.
- Finally, consideration must be given to the issue of administrative oversight and control of subnational government units by the central government. There are important questions in this regard. To what extent should the exercise of subnational competencies be supervised administratively by the centre? Should the centre be limited in its powers of intervention, and if so, how? What should the constitution say about this?

### *Finance*

- Regarding the topic of subnational finance, an especially relevant issue has to do with determining whether the constitution should recognise the financial autonomy of the subnational level(s) of government and if so, what principles should be established. For example the constitution, or alternatively general or special legislation, could set forth how subnational level(s) of government are to be funded (e.g. by their setting and collecting their own taxes, through a tax-sharing mechanism, by revenue redistribution from the central government, or through a combination of these).
- Additional questions to be considered include whether the constitution should contain a general commitment to fund any additional functions that may be transferred to the subnational level(s) of government from the centre; and if the constitution should incorporate a commitment to the equalisation of available public funds in order to ensure some equivalence in prosperity and well-being across the country. Regarding the latter, as mentioned earlier some of the benchmarking countries have included objectives for financial arrangements in their constitution, such as the "the just division of the national product between…regions", as is the case in Portugal, while others have a more detailed fiscal constitution. When considering including provisions on fiscal equalisation, it is important to take into account trade-offs related to, for example, the fiscal autonomy of subnational level(s) of government.

### *Central state decision making*

- As shown previously, the benchmarking countries have created different institutions and procedures to ensure representation of the subnational units in central government decision-making mechanisms. In this regard, a relevant issue to reflect upon is whether the central legislature should have a second chamber that represents subnational government and, if so, how they should be represented, and how the Constitution should deal with this.
- In case subnational representation in the central legislative organ is adopted, for example through the creation of a second chamber, several additional questions arise that merit consideration. For example, should it have functions that are specifically related to subnational government (e.g. boundary changes, setting of local taxes or central government intervention in subnational unit affairs), and should such a chamber also represent any subnational units that are granted special autonomy? Similar issues to be considered include whether or not to regulate through the constitution representation of the subnational level(s) of government in other central government institutions, and whether to lay down constitutional provisions about the different forms of participation by subnational units in central government decision making about issues affecting them.

### *Co-ordination and co-operation*

- Consideration should also be given to the issue of horizontal and vertical co-ordination. First, references to principles of solidarity or loyalty among the different levels of government can be included in the constitution. Such references may be tied to constitutional provisions for possible fiscal equalisation mechanisms. Secondly, consideration can be given to the question of whether to include in the constitution any provisions for horizontal co-ordination among subnational units, for example to deal with service delivery or cross-border problems. However, in most countries analysed for this chapter arrangements related to vertical co-ordination are found in general or special legislation. Similarly, consideration should be given to the question of whether or not the constitution should include provisions for vertical co-ordination (i.e. between the centre and one or more subnational levels, or between the intermediate/regional and lower subnational levels in the case of a three-tier system).

## Table 5.1. Comparative overview of multi-level governance and territorial organisation

P=Present in jurisdiction; A=Absent in jurisdiction; U= presence uncertain; N/A=Not applicable to jurisdiction

| **1. Territorial organisation** | | Finland | Portugal | New Zealand | Colombia | France | Greece | Netherlands | Japan | Australia | Germany | Spain | Canada |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Recognition of principle of decentralisation | Constitutional provision | P | P | N/A | P | P | P | A | P | P | P | P | P |
| | Provision in law | P | P | P | P | P | U | U | P | P | P | U | P |
| Provision for number of units and configuration | Constitutional provision | P | P | N/A | P | P | P | A | A | P | P | P | P |
| | Provision in law | P | P | P | P | P | P | P | P | P | P | P | P |
| Drawing and protection of boundaries | Constitutional provision | P | P | N/A | P | P | P | P | A | P | P | P | P |
| | Provision in law | P | P | P | P | P | U | P | U | P | P | P | P |
| ***Prescribed levels of subnational units*** | | | | | | | | | | | | | |
| General decentralisation | Constitutional provision | P | P | N/A | P | P | P | P | P | P | P | P | P |
| | Provision in law | P | U | P | P | P | P | U | P | P | P | P | P |
| Special autonomy | Constitutional provision | P | P | N/A | N/A | P | P | N/A | N/A | N/A | A | A | P |
| | Provision in law | P | U | N/A | N/A | U | P | U | N/A | N/A | A | U | U |
| Indigenous communities | Constitutional provision | A | A | N/A | P | A | A | A | A | A | N/A | A | P |
| | Provision in law | P | A | P | P | A | U | A | A | A | N/A | U | P |
| Cities | Constitutional provision | A | P | N/A | P | P | A | A | P | P | A | A | A |
| | Provision in law | A | P | P | P | P | U | U | P | P | U | U | U |
| **2. Structure of subnational government** | | Finland | Portugal | New Zealand | Colombia | France | Greece | Netherlands | Japan | Australia | Germany | Spain | Canada |
| Degree of autonomy | Constitutional provision | P | P | N/A | P | P | P | P | P | P | P | P | P |
| | Provision in law | P | P | P | P | P | P | P | P | A | P | P | P |
| Provisions for asymmetry | Constitutional provision | P | P | N/A | P | P | P | A | P | P | P | P | P |
| | Provision in law | P | U | P | U | U | U | U | P | P | P | P | U |
| ***Provision for subnational government institutions*** | | | | | | | | | | | | | |
| General decentralisation | Constitutional provision | P | P | N/A | P | A | P | P | P | P | P | P | P |
| | Provision in law | P | P | P | P | P | P | P | P | P | P | P | P |
| Special autonomy | Constitutional provision | P | P | N/A | N/A | P | P | A | N/A | N/A | N/A | A | P |
| | Provision in law | P | P | N/A | N/A | P | P | A | N/A | N/A | N/A | U | U |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Indigenous communities | Constitutional provision | A | A | N/A | P | A | A | A | A | A | N/A | A | A |
| | Provision in law | P | A | P | P | U | A | A | A | A | N/A | U | P |
| Cities | Constitutional provision | A | P | N/A | P | A | A | A | A | A | A | P | A |
| | Provision in law | A | P | A | P | U | U | U | P | A | U | U | U |
| ***Provision for subnational electoral system*** | | | | | | | | | | | | | |
| General decentralisation | Constitutional provision | P | P | N/A | P | A | P | P | P | P | P | P | A |
| | Provision in law | P | P | P | P | P | P | P | P | P | P | P | A |
| Special autonomy | Constitutional provision | A | P | N/A | N/A | A | A | N/A | N/A | N/A | N/A | A | A |
| | Provision in law | P | P | N/A | N/A | P | P | N/A | N/A | N/A | N/A | U | A |
| Indigenous communities | Constitutional provision | A | A | N/A | P | A | A | A | A | A | N/A | A | A |
| | Provision in law | P | A | P | P | A | A | A | A | A | N/A | U | P |
| Cities | Constitutional provision | A | A | N/A | P | A | A | A | A | A | A | P | A |
| | Provision in law | A | U | P | P | A | A | A | P | A | U | U | U |
| Protection of cultural rights | Constitutional provision | P | P | N/A | P | P | P | A | A | A | A | P | P |
| | Provision in law | P | U | P | P | U | U | U | U | A | A | U | P |
| Degree of central/ local control | Constitutional provision | A | P | N/A | P | A | A | A | P | A | P | P | P |
| | Provision in law | P | U | P | P | U | U | U | P | A | P | U | U |
| **3. Division of powers and responsibilities** | | Finland | Portugal | New Zealand | Colombia | France | Greece | Netherlands | Japan | Australia | Germany | Spain | Canada |
| ***Devolved powers specified*** | | | | | | | | | | | | | |
| General decentralisation | Constitutional provision | A | P | N/A | P | A | A | P | A | P | P | P | P |
| | Provision in law | P | P | P | P | P | P | P | P | A | A | P | A |
| Special autonomy | Constitutional provision | A | P | N/A | N/A | P | P | N/A | N/A | N/A | N/A | A | P |
| | Provision in law | P | P | N/A | N/A | P | P | N/A | N/A | N/A | N/A | A | A |
| Indigenous communities | Constitutional provision | P | A | N/A | P | A | A | A | A | A | N/A | A | P |
| | Provision in law | P | A | P | P | A | A | A | A | P | N/A | A | P |
| Cities | Constitutional provision | A | A | N/A | P | A | A | A | A | A | A | A | A |
| | Provision in law | A | U | A | P | A | A | U | P | A | A | U | U |
| **4. Finance mechanisms** | | Finland | Portugal | New Zealand | Colombia | France | Greece | Netherlands | Japan | Australia | Germany | Spain | Canada |
| ***Provision for financial autonomy*** | | | | | | | | | | | | | |
| General decentralisation | Constitutional provision | A | A | N/A | P | P | P | P | A | P | P | P | P |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Provision in aw | P | U | A | P | P | P | P | P | P | P | U | U |
| Special autonomy | Constitutional provision | P | A | N/A | N/A | A | A | N/A | N/A | N/A | N/A | A | P |
| | Provision in law | P | U | N/A | N/A | P | U | N/A | N/A | N/A | N/A | U | U |
| Indigenous communities | Constitutional provision | A | A | N/A | P | A | A | A | A | A | N/A | A | A |
| | Provision in law | A | A | A | P | A | A | A | A | A | N/A | A | P |
| Cities | Constitutional provision | A | A | A | P | A | A | A | A | A | A | P | A |
| | Provision in law | A | U | A | P | A | U | U | P | A | A | U | U |
| ***Tax power*** | | | | | | | | | | | | | |
| General decentralisation | Constitutional provision | P | P | N/A | P | P | A | P | A | P | P | P | P |
| | Provision in law | P | P | P | P | P | P | P | P | P | P | P | P |
| Special autonomy | Constitutional provision | A | P | N/A | N/A | P | A | N/A | N/A | N/A | N/A | A | P |
| | Provision in law | P | P | N/A | N/A | P | P | N/A | N/A | N/A | N/A | A | P |
| Indigenous communities | Constitutional provision | A | A | N/A | P | A | A | A | A | A | N/A | A | A |
| | Provision in law | A | A | A | P | A | A | A | A | A | N/A | U | A |
| Cities | Constitutional provision | A | A | N/A | P | A | A | A | A | A | A | P | A |
| | Provision in law | A | U | A | P | P | U | U | A | A | A | P | U |
| Revenue redistribution and fiscal equalisation | Constitutional provision | P | P | N/A | P | P | P | A | A | P | P | P | P |
| | Provision in law | P | U | P | P | P | P | U | P | P | P | P | P |

| **5. Impact on central state decision making** | | Finland | Portugal | New Zealand | Colombia | France | Greece | Netherlands | Japan | Australia | Germany | Spain | Canada |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Obligation to consult | Constitutional provision | A | P | N/A | P | P | A | A | P | A | P | P | P |
| | Provision in law | A | U | P | P | U | U | U | P | A | P | P | U |
| Central institution representing subnational units | Constitutional provision | P | A | N/A | A | P | A | P | A | P | P | P | A |
| | Provision in law | A | A | A | A | A | A | A | P | A | P | A | A |
| Central supervision of subnational governance | Constitutional provision | A | P | N/A | P | A | P | P | A | A | A | P | A |
| | Provision in law | A | U | P | P | U | U | P | P | A | P | U | A |

| **6. Co-ordination mechanisms** | | Finland | Portugal | New Zealand | Colombia | France | Greece | Netherlands | Japan | Australia | Germany | Spain | Canada |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Recognition of principle of solidarity / loyalty / co-operation | Constitutional provision | A | P | N/A | P | P | A | A | A | A | P | P | A |
| | Provision in law | P | U | P | P | U | U | U | U | A | P | U | P |
| Horizontal co-ordination | Constitutional provision | A | A | N/A | P | A | A | A | A | A | P | P | P |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Provision in law | P | U | A | P | U | U | U | P | P | P | U | U |
| Vertical co-ordination | Constitutional provision | A | P | N/A | P | P | P | A | A | A | P | P | P |
| | Provision in law | P | U | P | P | U | U | U | P | P | P | U | U |

Note: This table compares the extent to which there is constitutional provision for each of these themes and associated sub-themes across all 12 countries. Where it is useful to do so, the table also breaks down sub-themes in line with the four different forms of territorial organisation. For each sub-theme, the status of provision in the constitution and in legislation are indicated for each country.
The category of "legislation" is used in the table to cover all the sources of authority for multi-level governance that fall outside the concept of a formal constitution. For the most part, the category comprises ordinary statutes or their equivalent. In some cases however, it also includes statutes with special status, sometimes referred to as "organic" law, which are used for various purposes in France, Spain, Colombia and Portugal. In addition, for the sake of completeness of coverage, but with some loss of accuracy, the legislation category includes some of the other sources for organising multi-level governance – including codes of practice, which sometimes are used for intergovernmental co-ordination in older constitutional systems.

## References

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## Notes

[1] The OECD has conducted extensive analyses on multi-level governance and decentralisation frameworks in recent years, including in its report *Multi-Level Governance Reforms* (OECD, 2017[4]); *Making Decentralisation Work: A Handbook for Policy-Makers* (OECD, 2019[1]); and through the *2019 Report of the World Observatory on Subnational Governance Finance and Investment* (OECD/UCLG, 2019[5]), among others.

[2] Power that is retained by the government after other powers were distributed to other authorities in the course of elections or by the process of delegation.

[3] Constitution of Colombia, art. 317. This article also provides for a proportion of that revenue to be allocated to certain matters, including protection of the environment, specified by legislation.